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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 70

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION, ET AL., PETITIONERS

v.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, RESPONDENT

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

A STATEMENT OF THE FACTS.

There were several facts omitted in the statement of the petitioners which the respondent believes desirable to call to this court's attention.

Walter Searles, the deceased pensioner, entered the Danville Home upon October 17, 1924. At the time of entering the home, he was required to, and did, enter into the following contract with the National Home for Disabled Volunteer Soldiers, a corporation:

"I agree that in the event of my death while a member of the National Home for Disabled Volunteer Soldiers, leav-

ing no heirs at law or next of kin, all personal property owned by me at the time of my death, including money or choses in action held by me and not disposed of by will, whether such property be the proceeds of pension or otherwise derived, shall vest in and become the property of the Board of Managers of the National Home for D. V. S. for the sole use and benefit of the post fund of said Home, and that all my personal property shall upon my death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after my death."

Mr. Searles died on September 16, 1926 and at his death there was on deposit to his credit with the Treasurer of the Danville Home the sum of approximately $1800.00. Prior to Mr. Searles' death the Home Treasurer had expended from time to time from such funds small amounts of money for incidental expenses of Mr. Searles while in the hospital. As of October 1, 1926 the sum of $1546.47 remained in the hands of the Home Treasurer, the balance having been paid by him to the child and to the sister of the deceased pensioner for their expenses in attending the funeral of decedent. These expenditures were made by the Home Treasurer apparently under the Rules and Regulations of the Home.

Prior to coming to the Danville Home, Mr. Searles had been in other such Homes, where he had received his pension from time to time. These moneys had been given to his son, Herbert A. Searles, who was permanently dependent upon him for support. Mr. Searles desired and expected his son to receive all his pension moneys and other property. That the pension moneys paid the Danville Home Treasurer were not given to his son was due to the fact that Mr.

Searles was an invalid patient in the hospital during his entire residence in the Danville Home.

All of the above facts are undisputed and are contained in the agreed statement of facts filed in this cause. (Rec. pp. 12-17.)

CONTESTED ISSUES.

IS THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONTRARY TO LAW?

A. Does Section 139 or Section 136 of Title 24, U. S. Code, control the disposition of the funds in controversy?

B. Did Section 139, when passed in 1902 repeal by implication a portion of Section 138 as such section existed at such time?

C. Did Section 136, passed in 1910, repeal by implication the entire section 139, passed in 1902, and a portion of Section 138?

D. Is the corporation and its successor estopped to deny the validity of the contract entered into between it and the deceased pensioner in conformity with Section 136?

E. Is Section 139 unconstitutional?

SUMMARY OF ARGUMENT

A pensioner possesses a vested right in pension moneys which have become due him; and where such moneys have been paid to a branch treasurer of one of the National Homes for Disabled Volunteer Soldiers, or a Veteran's Administrative Facility for disbursement to the pensioner for his benefit, the Treasurer becomes Trustee of such funds, the pensioner continuing to have a vested right to the funds in the nature of a chose or right in action ..... (pp. 5-10)

Such part of these funds as may remain in the hands of the Treasurer at the death of the pensioner pass to the pensioner's heirs at law or next of kin, by virtue of an harmonious construction of Sections 136, 138 and 139 of Title 24, U. S. Code ..... (10-22)

and also by virtue of a contract existing between the pensioner and the Home ..... (22-24)

That in order for Section 139 to control the disposition of such funds, a portion of Sections 136 and 138 must be found to have been repealed by implication ..... (pp.16, 31)

That Section 139, so construed, would be unconstitutional, the section containing an arbitrary and unreasonable classification, also a direct deprivation of property, both being obnoxious to the due process clause of the Fifth Amendment to the Constitution of the United States; the section further containing an unlawful attempt by Congress to govern a matter not within its power, that of the descent of the property of a citizen and resident of the State of Illinois ..... (pp. 25-30)

ARGUMENT

I.

PENSION MONEYS WHICH HAVE BECOME DUE A PENSIONER AND WHICH HAVE BEEN PAID OVER TO A BRANCH TREASURER OF THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, A CORPORATION, FOR DISBURSEMENT TO THE PENSIONER OR FOR HIS BENEFIT CONSTITUTE FUNDS IN THE NATURE OF PERSONAL PROPERTY OWNED BY THE PENSIONER, THE TREASURER BEING THE MERE TRUSTEE OR DEPOSITARY OF THE FUNDS FOR THE PENSIONER.

In order to determine the proper disposition of the funds in controversy, it is very essential to attempt to determine the legal status of such funds. Section 138, Title 24, U. S. C., distinctly states that all pensions payable or to be paid to members of any of the branch homes of the National Home for Disabled Volunteer Soldiers, shall be paid to the Treasurer of such Home to be disbursed for the benefit of the pensioners under the Rules and Regulations of the Home; the payments to be made to the Branch Treasurer through the Bureau of Pensions upon a certificate by him that the pensioner is an inmate of the Home *on the day to which said pension is drawn.* Section 51, Title 38, U. S. C., provides that all pensions are to be paid to pensioners *once each month.*

In complying with the provisions of the foregoing sections, the Bureau of Pensions requires the Branch Treasurers of the several Branches of the National Home for Disabled Volunteer Soldiers to issue their certificates each month to the Bureau of Pensions showing that there is due

Note: Wherever the words "Home Treasurer" or "Branch Treasurer" are hereafter used the same refer to the Treasurer of the Danville, Illinois, branch of the National Home for Disabled Volunteer Soldiers, a corporation, or its successor, the Veterans' Administration.

References to United States Statutes utilize Title and Section Numbers of U. S. Code. More specific designation thereof will be found in Appendix A.

the specified pensioners residing in their respective Homes upon a specified day of each month a certain sum of money. The aggregate sums so certified are then submitted to the Secretary of the Treasury of the United States, who pays such sum to the Bureau of Pensions which in turn places upon deposit in the United States Treasury or other depository to the credit of each of the several Branch Treasurers the sum of money so specified by them. Section 138 also provides that the Branch Treasurer shall give adequate security for the proper payment of the pensions so received by them for disbursement to the pensioner.

The two sections apparently contemplate that the money received by the Home Treasurer belongs to the pensioner and is to be disbursed to him, the only discretion resting in the Home being as to the manner in which the disbursement should be made. So far as the actual ownership of the money is concerned, it seems obvious that no Rules and Regulations of the Home could change its status. Even under such Rules and Regulations, however, (see Stipulation of Facts, paragraph 10, Rec. 16), the Home recognized that these funds were in fact the pensioner's, and that the Treasurer was merely the trustee or custodian of them, and could retain them temporarily, only in the event that the member was sick or incompetent, and until he became well or was discharged from the Home, in which event they had to be paid to him; and even when he was in the hospital such rules provided that parts of the funds should be expended from time to time for his *incidental expenses, for his indebtedness, or to his relatives.*

In this case the Home Treasurer actually paid a part of such funds to the surgeon of the Home for incidental expenses of the pensioner while he was in the hospital, and also paid some $200.00 from such funds to Herbert Searles,

the pensioner's son, to defray his expenses in attending the funeral of his father. (Stip. of Facts, R. 14.)

It would seem clear that under these circumstances the pensioner possessed a vested right to such pensions *paid to* the treasurer for disbursement to him. The petitioners apparently contend, however, that by labeling the funds as "pensions" or "pension money" instead of "proceeds of pensions," the actual legal status of the funds is changed thereby, and that the funds continue to remain in the category of mere gratuities subject to disposition by Congress in whatever manner it deems fit. (See Pet. Brief, pp. 11-12.)

This contention proceeds upon two false assumptions:

First: That the moneys are unpaid by the U. S. Government.

Second: That the pensioner does not possess a vested right in such pension moneys.

A mere reading of the Statutes reveals the falsity of the first assumption. Section 138, Title 24, specifically provides that such moneys are to be paid to the *treasurer of the Home* for disbursement to the pensioner. This, of itself, negatives the theory that such pensions are *unpaid* by the Government. Without such fact being in evidence, we assume that the Branch Treasurer has, in this case, deposited such funds *received* by him in the U. S. Treasury. The U. S. Treasury, however, is a mere depository of the funds, and use of it was purely optional with the Treasurer of the Home, since he could have used any *Bank* (properly qualified therefor) for such purpose had he so desired. (See Section 117, Title 24, U. S. C.)

That the United States Government, as such, is relieved of all liability for such funds once they have been paid to

the Branch Treasurer is specifically held in the case of Edward O'Mara, Administrator, vs. U. S., 47 U. S. Court of Claims 27, in which case the Administrator of the decedent sued the United States for the recovery of $928.00 which was paid by the pension agent to the Treasurer of the Branch Home prior to the death of the pensioner, and which fund was held by the Home Treasurer at the time of the pensioner's death. The money was demanded from the Branch Treasurer and the National Home for Disabled Volunteer Soldiers, and the demand refused. The Court held that the corporation had power to take, hold, and convey personal and real property and to sue and be sued in courts of law and equity, and that inasmuch as the United States had paid to the proper party (the Branch Treasurer) the pension fund due the pensioner, that it could not be held liable for the debt, which it did not owe—and that any controversy would necessarily have to be between the Administrator and the Branch Treasurer, for the corporation of which he was an official.

The second erroneous assumption proceeds from the failure to apprehend that these funds are not such pension moneys as accrue during the interim between the time of application and allowance of a pension, but are the *accumulations* from an *allowed* pension, in which the several *payments*, having become *due*, have been actually paid by the Government. In the former case the pensioner has a mere *expectancy* until the pension has been allowed; in the latter case, the pensioner has a *vested right* in the pensions which have actually become due. This distinction has been stated generally as follows: "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit does

not constitute a vested right. (12 Corpus Juris, p. 955; Cooley, Constitutional Law, p. 351; Fearne, Contingent Remainders, p. 1; Pearsall vs. Great Northern Railroad Co., 161 U. S. 646, 673; 40 L. Ed. 838; Jersey City Presb. vs. First Presb. Church, 80 NJL 572, 78 Atl. 207, 210.)

So it is, that although it is generally held that a pension to be paid in the future is a gratuity in the continuance of which the pensioner has no vested right, yet it is universally conceded that where any payment under a pension has become due, the pensioner has a vested right to it. (21 Ruling Case Law, Section 7 (p. 243). Pennie vs. Reis (1889) 132 U. S. 464, 33 L. Ed. 426, Ryan vs. Foreman, 262 Ill. 175; Kavanaugh vs. Police Pension Fund Comrs. (1901) 134 Cal. 50, 66 Pac. 36; Re Smith (1902) 130 N. C. 638, 41 S. E. 802; Smith vs. Alkin (1890) 80 Mich. 205, 45 N. W. 136.)

It is admitted that the funds in this case were pension moneys which had become *due*, for the Branch Treasurer had certified to such fact before the same were paid over to him. As to such *due payments* the pensioner would have possessed a vested right in them, even while unpaid and in possession of the Government. It is a noteworthy fact in this case, however, that except for the circumstance that Walter Searles, the pensioner, was an invalid in the hospital, *all of this pension must and would have been paid to him.* That he was unable to receive the pension immediately upon its payment to the Home Treasurer, cannot, however, affect his legal *right* to such moneys, and this right, being vested, constituted a chose or right in action as to such funds, which upon his death passed to his Administrator, the respondent herein, for the benefit of his only child.

We have not discussed, expressly, the proposition that the Treasurer is trustee of the funds of the pensioner.

That he does occupy such a position may be readily determined from a consideration of the following:

First: Section 138 expressly provides that the Treasurer shall receive the funds *for disbursement for the benefit of the pensioner;* which is in effect an express designation of a trust.

Second: Section 52, Title 24, U. S. C., providing for payments of pensions to inmates of the Soldiers Home at Washington, D. C., uses the same method for payment through the Home treasurer as is provided in Sec. 138, and by almost identical language, except that the treasurer is specifically required to hold such funds "*in trust*" for the pensioner.

Third: The funds are not the "*treasurer's*" or the "*Government's*" since the several sections of Title 24 expressly provide that the funds remaining in the Treasurer's hands upon the death of the pensioner shall be paid to the pensioner's heirs at law, or to other designated beneficiaries.*

II.

PERSONAL PROPERTY OWNED BY A MEMBER PENSIONER OF A BRANCH OF THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, A CORPORATION, OR ITS SUCCESSOR, THE VETERANS' ADMINISTRATION, AT THE TIME OF HIS DEATH PASSES TO HIS HEIRS AT LAW OR NEXT OF KIN, OR IF NO SUCH PERSONS EXIST, TO THE BOARD OF MANAGERS OF SAID CORPORATION, OR ITS SUCCESSOR.

In order to construe Sections 136, 138 and 139 of Title 24, U. S. C., it is necessary to consider the history of the legislation concerning the disposition of such pension funds

*For a discussion of the rules determining trusts as applied to this case, see Perry, Trusts and Trustees, (7th Edition), Chap. 1—Sections 1, 2, 25, 26, 27; Chap. 2—Sections 30, 31, 39, 60, 67; Chap. 4—Section 112; Chap. 6—Section 166; Chap. 27—Section 828.

as are involved in this cause. Section 138, as enacted in 1881 and amended in 1882 provided that pension moneys due members of the home were to be paid to the *Treasurer* of such home to be disbursed to, or for the benefit of, the pensioners, and also provided that *any balance* of the pension which *might remain* at the *date* of the pensioner's discharge should be paid over to him, and in case of his death at the home, the same should be paid to the widow or children or in default of either, to his legal representatives. This was then the only existing provision concerning the disposition of any pension moneys or other personal property owned by a pensioner dying at the National Soldiers Home. We feel that there can be no doubt that the funds referred to in this section of the statute were the funds, if any, *remaining in the hands of the Treasurer of the Home at the date* of the Pensioner's death. The Circuit Court of Appeals in the case cited by the petitioner (Durack vs. National Home for Disabled Volunteer Soldiers, 44 Fed. (2d) 516) expressly recognizes this construction, as do also the several opinions of the Comptroller General dealing with this subject.

No additional enactments were made until the year *1902* at which time Section 139, Title 24 USC was enacted, which provided that "any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named . . ." (This statute does not contain the word "hereafter" as set forth in the Court's opinion, 44 Fed. 2d, page 516, or in petitioner's brief, p. 20.)

No amendment was made to Section 138 at this time, nor was it repealed by any specific enactment, and such section still contained the express provision that any balance

of the pension funds *remaining* in the hands of the *Branch* Treasurer at the date of the pensioner's death was to be paid to his widow or children or to his legal representatives.

Subsequent to the passage of Section 139, Congress on June 25, 1910, enacted Section 136, Title 24, U. S. C., which provided that a pensioner upon entering a National Home for Disabled Volunteer Soldiers should enter into a contract with the Home whereby he should agree that upon his death at such home leaving no heirs at law or next of kin, all personal property owned by him at his death, including money or choses in action held by him, whether such property be the proceeds of pensions or otherwise derived, should vest in and become the property of the Board of Managers of such Home for the uses and benefit of the Post Fund of the Home, and that all of his personal property should upon his death pass to such Board of Managers, subject to be reclaimed by any legatee or heir at law within five years after the pensioner's death. Following the passage of Section 136, and upon August 17, 1912, the present Section 138 was re-enacted, omitting the last clause of such section as previously enacted, which provided for the disposition of any balance of pension moneys remaining with the Branch Treasurer at the time of the pensioner's death. It was expressly provided, however, in the Act of August 17, 1912, c. 301, Section 6, 37 Stat. 313, that nothing therein should be construed as amending or repealing 22 Stat. 322 concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers; the latter statute being Section 138 as originally enacted.

We feel that Congress in enacting Section 139, which was passed without any controversy in Congress concerning it, intended that such Section was to cover the parts of the month's pension which had become due a member at

the time of his death, but had not yet been paid to the Home Treasurer, which in this case amounted to the sum of $28.80, and that Section 138, Title 24, U. S. C., as then in force and effect, adequately covered the balance of the pension moneys *remaining* in the hands of the Treasurer at the time of the member's death. Examined closely, Section 139 is found not to contain any reference to funds already paid to a *Treasurer* of the Home or a balance *remaining* with a Treasurer of the Home, whereas Section 138 deals specifically with funds previously paid to a *Treasurer* of a Home and remaining in his hands at the time of a pensioner's death. Thus construed, there is no conflict between the two sections.

In the first place, it is important to notice that Section 139 applies only to a *balance of pension money due a member at the time of his death*. Suppose the member had left the home just prior to his death. Upon being discharged from the Home, the pensioner would be entitled to receive all pension moneys in the hands of the branch treasurer (Sec. 138, Title 24). This is not only provided for in the act itself, but also under the rules and regulations of the Home. **(R. 16-17.)** It is apparent that if Mr. Searles had left the home only 12 days prior to the date of his death, he would have been entitled to receive the entire sum of money in the hands of the branch treasurer at such time which, however, *would not have included the $28.80 which was a balance of pension money due the pensioner* but which had not yet become payable to, or been turned over to, the branch treasurer—such sum of money being still in the hands of the United States Government. Assume further that Mr. Searles had then returned to the Home, but had died before the ensuing month's pension was payable. Such sum—in this case $28.80, would have been a "balance of pension money due a member at the time of his death," strictly within the meaning of Section 139.

Again, contrast this section with Sec. 138, and it is seen that whereas Sec. 139 disposes of any *balance of pension money due the member at the date of his death only*, Sec. 138 disposes of any "balance of pension moneys which *remain* at the date of the pensioner's *discharge* or *death*."

Sec. 138 clearly applies to accumulated pension moneys in the hands of the branch treasurer, since he does not possess any balance of pension money due the member for a part of a month; and if the word "*remain*" is to be given any effect the Section can only apply to funds already received. Sec. 139, conversely, contains no reference whatsoever to any balance of pension moneys *remaining* with the Treasurer at any specified time, but only to "pension moneys due a member at the date of his death." In addition, whereas Sec. 138, refers particularly to moneys previously paid to the *Treasurer* of the Home—Sec. 139 contains no words which would indicate that the "balance of pension moneys" referred to therein are funds previously paid to, or in the hands of, the *Treasurer*. From the omission of any such words, it would seem that the intention was to make this section applicable to such sums of moneys as had not, at the date of the pensioner's discharge or death, been paid to such treasurer.

This conclusion seems inescapable when sections 138 and 139 are considered in conjunction with an analogous section, that of Section 52, Title 24, U. S. C. This latter section provides for the payment of pensions to inmates of the Soldiers Home at Washington, D. C.; the procedure being almost identical with that provided for the payment of pensions of inmates of the National Soldiers Home. This section, after expressly providing that such pensions shall not become a part of the funds of the Home but shall be held by the Treasurer *in trust* for the pensioner to whom it would otherwise have been paid directly, provides:

> "In case of the death of any pensioner any pension money due him and remaining in the hands of the Treasurer shall be paid to his legal heirs."

Here again we have a specific reference to funds *due* the pensioner and *remaining* in the hands of the *Treasurer* at the time of the pensioner's death. This section still applies to such funds in the hands of the Treasurer of the Soldiers Home at Washington, D. C., of which home, Walter Searles, the pensioner in this case, *might have been a member had he so desired.* It is obvious that such section is almost identical with Section 138 as it existed prior to its re-enactment in 1912, and it is noteworthy that Section 138 was not so re-enacted until *after* Section 136 was enacted in 1910 making provision for the disposition of such funds. There is no section analogous to Section 136 applying to funds in the hands of the Treasurer of the Soldiers Home at Washington, D. C.

It is a well recognized rule in the construction of statutes in pari materia that the court will attempt to harmonize the various provisions of the statute, whenever possible. The courts have stated the law on such matters as follows:

> "Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the sub-

ject matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. 36 Cyc. 1147; U. S. vs. Colorado, etc. R. Co., 157 Fed. 321; People's U. S. Bank vs. Goodwin, 162 Fed. 937.

"In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent, and a construction which best secures the rights of all the parties affected has been held a proper construction. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time prevails. 59 C. J. p. 999; Wells Fargo and Co. vs. Mayor and Aldermen of Jersey City, N. J. 207 Fed. 871 (1913); U. S. ex. rel. Hains vs. Daniels, 279 Fed. 844 (1922)."

The Court, in the case of Durack vs. National Home for Disabled Volunteer Soldiers, 44 Fed. (2) 516, relied upon by petitioners, felt that there was a conflict between Sections 138 and 139, and contrary to the established rules concerning the repeal of Statutes by implication, held that Section 139 repealed by implication that part of Section 138 dealing with the disposition of pension moneys remaining in the hands of the branch treasurer at the time of the member

pensioner's death, and held that all such funds should pass to the persons designated in Section 139. Without citing the many supporting cases, we call the court's attention to the rules governing repeal by implication as stated in 59 Corpus Juris pp. 905-908:

> "The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently, or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication, unless it is inevitable, and a very clear and definite reason can be assigned. Nor will statutes be held repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be *clear*, *necessary*, and *irresistible*." [Italics ours.]

At page 910, 59 C. J., it is stated:

> "A statute may repeal an earlier one by implication where it covers the whole subject matter of, and is intended to be a substitute for, the earlier one, or where its provisions are so repugnant to those of the earlier statute as to make the two statutes irreconcilable. Generally speaking, these are the only ways in which a repeal by implication can take place."

Sec. 139 does not cover the whole subject matter of Section 138, nor are its provisions necessarily (nor even reasonably) repugnant to the provisions of Section 138. If Congress intended this section to do what the Circuit Court

of Appeals of the First Circuit held that it did do, it is difficult to understand why Congress did not re-enact Section 138 at that time, leaving off a part thereof so as to make such intention clear.

These two sections remained, however, with no further enactments concerning their subject matter until June 25, 1910, at which time Congress passed Section 136, Title 24, USC (Appendix A) which provided that the member upon entering a Home, should enter into an agreement whereby all of his personal property, including moneys and choses in action, etc., should pass to his legatees, heirs at law, or next of kin, with the further provision that at his death all of his said personal property should vest in the Board of Managers subject to be reclaimed by such legatees, heirs at law, or next of kin by a petition filed with the Board of Managers within five years after the member's death. It seems clear to us that it was the purpose of Congress in passing this Section, to amplify that part of Section 138 dealing with the funds of the pensioner in the hands of the Home Treasurer, for Section 136 covers *all* personal property including money and choses in action. Congress certainly understood that any pension moneys belonging to a pensioner, but for some reason or another remaining in the hands of the Home Treasurer, constituted a chose in action owned by the pensioner, and evidently meant to include in this enactment such funds as well as all other personal property owned by the pensioner at the time of his death. In essence, this statute provides that all personal property of the pensioner shall escheat to the United States in the event of the pensioner's death leaving no legatees, heirs at law, or next of kin, and was accordingly drawn so as to cover all of his per-

sonal property.*† It was only *after this statute* was passed that Congress later and in 1912 re-enacted Section 138, omitting the clause providing for the disposition of the pension money remaining in the hands of the Home Treasurer at the time of a member's death.

The petitioners (Pet. Brief pp. 11-12) have attempted to distinguish between pension money paid to a pensioner by the Home Treasurer and on deposit in a bank or other depository, and those sums remaining in the hands of the Home Treasurer, calling the former "proceeds of pension" and the latter "pensions." The decisions of the Comptroller of the Treasury and Comptroller General cited by the petitioners (Pet. Brief, p. 11) do not *sustain* this distinction.

In XIX Comp. Treas. 388 (January 4, 1913), an attempt was made to construe Sections 136 and 139. The Comptroller of the Treasury first discussed Sec. 139, (Act of July 1, 1902) holding that it applied to all pension money in the hands of the Home Treasurer. He then discussed Sec. 136 (Act of June 25, 1910) referring to it as containing two provisions, the first vesting all personal property of the deceased pensioner in the Board of Managers, the second as authorizing the reclamation of such property by any legatees, or heirs at law, of such deceased pensioner, and said:

> "It will be observed that the first provision of this later act applies to 'all personal property*** whether such property be the proceeds of pensions or otherwise derived.' Hence said property evidently includes the pension money referred to in the act of July 1, 1902, SUPRA, and I think the term 'all personal property,' as used in the second

*Note: The analogous Section 52, Title 24, specifically provides that if demand for the funds are not made within a specified time, they shall **escheat** to the **home.**

†That the congressional committee believed, when proposing this legislation, that such was its purpose and effect, see Appendix B, Infra.

provision, must also be construed to include said pension money."

In 4 Comp. Gen'l. 752 (1925) another attempt was made to construe Sections 136 and 139. In this opinion the Comptroller General stated that Section 136 applied only to the "personal effects" of the deceased member, and that Section 139 applied not only to money held by the Treasurer but also to money paid to the pensioner and in his possession or on deposit in a bank or other depository.

The untenability of the petitioners' contention that Section 136 was designed to cover the *"personal effects"* only of the pensioner, (see Pet. Brief, pp. 9-11) is shown by the fact that the Section specifically refers to "choses in action" which in their very nature are not *personal effects;* and by the further fact that provisions had already been enacted for disposition of such property. Sec. 137, Title 24, makes all such members of the Home subject to the Articles of War, in the same manner as if they were in the Army. Sec. 1584, Title 10, (being Article 112 of the Articles of War), specifically provides for the disposition of the personal effects of all those persons subject to the Articles of War, (and it is noteworthy that this section also provides that the next of kin shall receive such property).

Although the Circuit Court of Appeals in the instant case did not hold that Section 139 was repealed by implication we believe that if any of the various statutes involved in the subject matter of this case, might reasonably be considered as so repealed, then Section 139, passed in 1902, might well be considered as repealed by implication upon the enactment of Section 136 (1910), for in the event that the pensioner has a vested right to pension moneys for a *part of a month* which have not yet been paid either to him or to the Home Treasurer, then the pensioner would have a chose or right in action to recover such pension

moneys so due him, which right would also pass to his heirs at law or next of kin under Section 136. Section 136 would, therefore, cover the entire subject matter of Section 139, as well as that of Section 138 concerning the disposition of pension moneys *remaining* in the hands of the Home Treasurer at the time of a pensioner's death.

It is difficult to know exactly what Congress did intend when passing these several statutes. It seems reasonable to suppose, however, that Congress did not intend to take away from a child of a pensioner the personal property owned by such pensioner at his death. *We believe that Congress did not have this right, except by contract with the pensioner,** even had it so intended, since such property would pass to the heirs at law or next of kin of such pensioner in accordance with the laws of the State in which he resided. Funds which belonged to him whether such funds were deposited in a Bank, invested in stocks, or left with the Treasurer of the Home, all constituted personal property in the nature of choses in action owned by him. Congress might have intended, however, to provide some method via contract, for the disposition of all such property in the event that such pensioner left no heirs at law or next of kin, and this it did by means of Section 136.

A question might very well arise, however, concerning pension moneys in the course of accrual which had never been paid to the pensioner, or which had never been paid to the Home Treasurer. As to such moneys, Congress might be held to control the disposition, inasmuch as it is questionable whether the pensioner owned a right or chose in action as to them. It seems obvious that he could not recover such part of a month's pension by any action or proceeding, inasmuch as the same did not become payable to him except

*This was also the opinion of the Congressional Committee, when the provision was discussed in committee. (Appendix B.)

upon the 4th day of each month. Upon this basis such funds not being a chose in action or other personal property covered by the provision of Section 136 some different provision might be necessary. Such provision, we feel, was made for such funds in the enactment of Section 139.

If these enactments be so construed, then, without doing conflicts to any of their provisions, and without resorting to any repeal by implication, we find that under Section 139 pension moneys for parts of a month which had accrued in the hands of the Treasurer of the United States but had not yet become legally *due* the pensioner, would be paid in accordance with the provisions of Section 139, Title 24, whereas all other personal property including choses in action, which in turn would include funds or pension moneys legally *due* the pensioner and in fact already paid by the United States Government to an officer of a separate corporation, or as now, to a bonded officer of the Veterans' Administration, to be disbursed to the pensioner, would be disposed of in accordance with Section 136, Title 24.

III.

THE FUNDS IN CONTROVERSY BELONG TO THE RESPONDENT BY VIRTUE OF THE CONTRACT BETWEEN WALTER SEARLES, THE DECEASED PENSIONER, AND THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, A CORPORATION.

There is a further reason why Sections 136, 138 and 139, Title 24, should be harmoniously construed as contended by respondent. There can be no doubt that the deceased pensioner, when entering the Home, believed when induced to sign the agreement referred to in Section 136, that such agreement meant just what it said, and that "moneys or choses in action, whether the same be proceeds

of pensions or otherwise derived," included his pension moneys which had been, or would be, paid to the Home Treasurer for disbursement to him. Almost any lawyer would have so informed him had he inquired concerning it. Now, then, should a *corporation* doing an act, not only within its powers, but doing such act by express legislative enactment, be permitted to escape the fair and reasonable obligations of such contract? We believe not.

It must be remembered that the funds in controversy are not those of the Government, but are moneys in the nature of a *trust fund* which at the time of payment in this cause were placed in the hands of *a bonded officer* of a corporation. The United States Government, *as such,* expressly disclaimed any rights to such fund. (See case of Edward O'Mara, Adm. vs. United States, 47 U. S. Court of Claims, 27 supra.) The only way in which the corporation could possibly claim any right to such funds after a pensioner's death must be by way of a contractual relation. This relation does in fact exist, and by a plain, fair and obvious construction thereof, the respondent is entitled to the funds, since the agreement provides that such property shall pass to the pensioner's heirs at law or next of kin. To reach the conclusions contended for by petitioners (apparently by the court in 44 Fed. 2nd 516) requires not only a strained technical construction of the statutes, but an entire disregard of the pensioner's contract. Otherwise stated, such a result is obtained by receiving the advantages of misrepresentations. (See Stipulation of Facts, Sec. 7, Rec. 15, showing intention of pensioner that *all* of his pension moneys should pass to his son, Herbert Searles.)

Even were the statute (Sec. 136) not in force, so that Section 139 might, by a not too involved species of reasoning, be held to apply to the funds in question, yet the con-

tract entered into by the National Home for Disabled Volunteer Soldiers should be enforced in favor of the respondent as here contended. Under such circumstances, the corporation, having made a valid contract, should be held estopped from setting up the Statute to defeat its obligation. In 10 R. C. L. Sec. 46 (p. 724) it is stated: "Estoppels, technically so-called, and estoppels in pais, operate both for and against corporations"; and Sec. 111, p. 799: "A party proposing the terms of a contract cannot be heard to object to them, and when a party has executed a written contract he is estopped to deny its terms." (See also 21 C. J. pp. 1110-1111.) Even were the United States, instead of the corporation, the original party to the contract, instead merely of succeeding to the rights and obligations of the corporation, it also would be estopped. (See 10 R. C. L. Sec. 31, p. 704):

> "It is quite settled that when the state makes itself a party to an action or contract or grant in its proprietary capacity, it is subject to the law of estoppel, as other parties litigant, or other contracting parties. And so, a state department in a matter of procedure and within the scope of departmental powers, may be estopped."

While discussing this provision in committee, the members seriously debated the propriety and legality thereof, finally concluding that the contractual relationship proposed offered the only feasible method of controlling all of the personal property of a deceased member and escaping the laws of escheat of the several States in which the "Homes" were located. The committee were agreed that the provision clearly covered all personal property, including all pension moneys, and that the "Home" should not receive the property except in those cases in which the member died, leaving no legatee or heir at law. (See Appendix B *infra*.)

IV.

SECTION 139, TITLE 24, IF CONSTRUED TO APPLY TO THE FUNDS IN CONTROVERSY, IS UNCONSTITUTIONAL, BEING CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioners contend that Sec. 139 should be so construed as to apply, not only to that part of a month's pension not payable to the pensioner or Home Treasurer at the time of the member's death, but also to all pension money paid over to the Home Treasurer by the Bureau of Pensions, for disbursement to the pensioner and standing to the credit of the pensioner in the U. S. Treasury or some other depository at the date of the pensioner's death. The respondent believes that if the section be so construed it is rendered unconstitutional and void.

It is a fundamental proposition that the Federal Government has only those powers granted to it by the Constitution and that the States have all of those powers not specifically granted to the Federal Government nor specifically prohibited to the States. The power of regulating the descent of property is one which has neither been granted to the Federal Government nor prohibited to the States. The Statutes of the State of Illinois govern the descent of the personal property of the deceased pensioner, and by such laws the respondent is entitled to such property for the benefit of the pensioner's child, Herbert Searles, (See par. 7, Stip. of Facts, Rec. 15.)

It is a well recognized rule that all property in which a person possesses a vested right at the time of his death passes to his legatees, devisees, heirs at law or next of kin or to his Administrator or Executor for their benefit (subject to taxes and payment of such deceased persons' debts). We have previously shown that the pensioner in this case

possessed a vested right in and to the pension moneys *paid* by the Government to the Branch Treasurer to be disbursed to him. That a vested right in an obligation constitutes a chose or right in action would appear to be a proposition so fundamental as not to merit citation of authority. However, we cite for the convenience of the court the following definitions of a chose in action:

> "Chose in action is a known legal expression used to describe personal rights of property which can only be claimed or enforced by action and not by taking legal possession." Wm. Searle Holdsworth, 33 Harvard Law Review, 997. (For a similar definition see Arthur L. Corbin, 77 Pa. Law Review, 207.)

In 50 Corpus Juris 764, it is stated:

> "A chose in action means, literally, a thing in action, and is the right of bringing an action, or a right to recover a debt or money or a right of proceeding in a court of law to procure the payment of a sum of money, or as it is many times defined by statutes, a right to recover money or personal property by a judicial proceeding." (Citing many cases.)

Vested rights in the nature of choses in action are property, and the Federal Government has been denied the right to deprive a person of property without due process of law by the 5th amendment to the Constitution of the United States.

To constitute a deprivation of property without due process it is not necessary that there be an actual physical taking of the property, but it is sufficient if its free use and enjoyment is affected; if the owner be deprived of the power of disposition of it; or if he be deprived of any of its essential attributes. (Osborn vs. Nicholson, 13 Wall.

654; 20 L. Ed. 689; 6 R. C. L. p. 473 and cases cited). So it has been held that the right to transmit property to one's descendants or next of kin is "property", within the meaning of the provision of the Constitution. (Dibrell vs. Lanier, 89 Tenn. 497; 15 S. W. 87).

Without entering upon any lengthy discussion of the proposition, it is clear that Congress would have no power to deprive the pensioner, Walter Searles, of his vested rights in the pension moneys, which have actually been paid over to him through payment made to his agent for disbursement, the Treasurer of the Home of which he was a member; nor does Congress have power to deprive him of the right to transmit such property to his heirs, or next of kin.

It appears to be just as clear that Congress cannot arbitrarily deprive the pensioner's only child and heir at law of such property which is his by operation of the laws of descent of the State of Illinois. This was quite plainly the consensus of opinion of the committee when drafting Sec. 136, providing that the pensioner should enter into a contract with the "Home" when admitted thereto, providing for the disposition of his personal property, including funds such as those involved herein. (See Appendix B.)

There is, however, an even more cogent reason why Sec. 139, if construed as contended by petitioners, should be held unconstitutional as contrary to the "due process" clause of the Fifth Amendment. Due process of law guaranteed by the federal constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. In order that a statute may comply

with the necessary requirements as to due process of law, it must not violate the limitations as to classification imposed by the constitutional inhibition as to the denial of the equal protection of the laws. Thus the test with respect to the requirement of due process of law, seems to be that if the law under consideration operates equally upon all who come within the class to be *affected*, embracing all persons who are or may be in *like situation* and *circumstances*, and the designation of the class is *reasonable*, not unjust or capricious or arbitrary, but based upon a real distinction, the law does operate uniformly, and if, added to this, the law is enforced by usual and appropriate methods, the requirement as to "due process of law" is satisfied. (Caldwell vs. Texas, 137 U. S. 692, 34 L. Ed. 816; Leeper vs. Texas, 139 U. S. 462, 35 L. Ed. 225; Maxwell vs. Dow, 176 U. S. 581, 44 L. Ed. 597.)

One of the essential requirements as to classification, is that the classification must not be capricious or arbitrary, but must be reasonable and natural or must be based on some natural principal of public policy. The legislature cannot arbitrarily create a class, and when thus created make it binding on the courts so that they would be bound to accept such classification as a proper one. (Gulf C. & S. F. R. vs. Ellis, 165 U. S. 150; 41 L. Ed. 666; Connolly vs. Union Sewer Pipe Co., 184 U. S. 540; 46 L. Ed. 679; Atchison T. & S. F. R. Co. vs. Matthews, 174 U. S. 96; 43 L. Ed. 909; Seaboard Air Line Ry. vs. Seegers, 207 U. S. 73; 52 L. Ed. 108; Southern Ry. Co. vs. Greene, 216 U. S. 400; 54 L. Ed. 536.)

The court, in holding void a statute assessing attorneys' fees against certain corporations in a certain class of actions, said, in Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150:

> "Classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classifications. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Section 139 is in form a statute of descent and escheat. Assuming for the purpose of this argument that Congress had power to govern the descent of the property described in such section, the classification adopted is highly arbitrary and capricious, entirely unadapted to the purpose intended. This *purpose* was evidently to give to the *needy* heirs of the decedent the specified property, since the widow, minor children and dependent mother or father, in the order named, inherit only. On no other basis can the discrimination against other children, or brothers or sisters, or other heirs, be explained.

It is questionable, even, that *need* is the basis of the classification, since the widow or minor children may be in affluent circumstances, yet they would take under the statute prior to dependent parents. However, assuming that need is the basis, and that it is also a reasonable one, yet the statute *unreasonably* discriminates against a class of heirs —the *adult dependent* children of a deceased pensioner— who *should* take such property prior to the dependent parents of such decedent, or in any event should not be prohibited from inheriting on the same basis as their younger brothers and sisters, their mother, or their grandparents.

The statutes of descent of the State of Illinois permit children of a decedent to inherit in preference to a parent, and *Congress* itself has shown that it considers an *adult dependent* child of a pensioner to be in a favored class.

Section 45, Title 38, U. S. C., provides that the Commissioner of pensions may, where a pensioner has deserted his wife, (who is in necessitous circumstances), minor children, or permanently dependent child, pay over to such persons one-half the pensioner's pension.

Section 46, Title 38, U. S. C., provides:

> "If any such pensioner shall become an inmate of a national soldiers' home one-half of the pension drawn in his behalf or to which he may become entitled during his residence therein shall be paid by the treasurer of that institution to such pensioner's wife, she being in necessitous circumstances and a woman of good moral character, or, if there be no wife, to the legal guardian of the minor child or children, or the *permanently dependent* and helpless child or children of such pensioner, on the order of the Commissioner of Pensions. [Italics ours.]

A similar provision for such relatives of a pensioner in a State Soldiers or Sailors home is also in effect (Sec. 47, Title 38, U. S. C.)

The respondent represents the only child of the deceased pensioner, who, although an adult, is admittedly *permanently* helpless, and was *dependent* upon his father for support. This support was in fact given until the pensioner was placed in the Home hospital, the Home Treasurer retaining the funds which the pensioner had previously sent to his son.

The classification contained in Sec. 139, which denies to a *dependent adult child* of a pensioner, property which

dependent parents, or a widow or minor children who are not even dependent, can receive, is so obviously arbitrary, unreasonable and discriminatory that it amounts to a denial to the appellee of the equal protection of the laws as guaranteed by the "due process" clause of the Fifth Amendment to the Constitution, and Sec. 139 is thereby rendered unconstitutional, if the same be held to govern personal property occupying the status of that involved in the cause herein.

V.

THE DECISION OF THE COURT IN THE CASE OF DURACK V. NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, 44 FED. (2) 516, IS ERRONEOUS.

Without considering, directly, the decision of the court in the case of Durack vs. National Home for Disabled Volunteer Soldiers, 44 Fed. (2nd) 516, which decision petitioners urge this court to accept as a correct statement of the law, (Pet. Brief, p. 12), we have attempted in this brief to reveal the errors of such court in its construction of the statutes involved. Such errors, we believe, are as follows:

First: The court held that Section 139, passed in 1902, repealed by implication a part of Section 138. The court, in such construction:

A. Failed to apprehend that the two sections concerned, or could be reasonably construed to concern, entirely different matters—Section 138 referring to pension moneys already paid to the Home Treasurer and *remaining* in his hands at the time of the pensioner's death, and Section 139 referring to a balance of pension money not yet paid over to the Home Treasurer at the time the pensioner died.

B. Failed to abide by the established rules concerning repeal by implication, in that:

1. No legislative intent was shown to repeal Section 138 by implication. (Nothing in the Congressional Record discloses any such intention.)

2. Section 139 does not cover the entire subject matter of Section 138.

3. Section 139 is not clearly, necessarily or irresistibly repugnant to, or in conflict with Section 138.

4. The two sections can reasonably be harmoniously construed together.

Second: The Court held that Section 136 did not affect the disposition of these funds. This holding was erroneous, because:

A. Section 136 specifically covered the funds in question whereas Section 139 covers such funds only by inference.

1. The funds were a *chose in action* disposed of by Section 136.

2. Section 139 does not mention any funds *remaining* in any *Treasurer's* hands.

B. Section 136 was passed in 1910, subsequent to the passage of Section 139 (in 1902). This is important, because:

1. Section 136 expressly covers the disposition of these funds, which was previously expressly covered only by Section 138.

2. Congress *intended* Section 136 to cover these funds, and intended Section 138 to cover them until the passage of Section 136, because:

a. Section 138 as enacted in 1881 and 1882 and in force until 1912 admittedly covers the funds.

b. Congress did not indicate, by any debates during the passage of Section 139, nor by any express repeal of a part of Section 138, that it intended any repeal of Section 138.

c. However, shortly *after* the passage of Section 136, Congress did, in re-enacting Sec. 138, omit that part of such Section dealing with these funds.

d. The congressional committee, in discussing Sec. 136, prior to its enactment, specifically agreed that this section would cover such funds. (Appendix B.)

C. Section 136 can reasonably be held to repeal by implication the clause in Section 138 relating to these funds, and probably also Section 139.

1. Section 136 covers the entire subject matter of the disposition of these funds following the death of a member pensioner.

2. The clause in Section 138 covering such funds, as it existed prior to the passage of Section 136, is *clearly repugnant* to Section 136, the *later* statute.

3. Congress, by omitting such clause in Section 138, when re-enacting it, shortly following the passage of Section 136, confirmed the inference that Section 136 had been intended when passed to repeal the clause in Section 138.

4. If the moneys referred to in Section 139 be considered a chose in action owned by the pensioner at his death, then:

a. Section 139 should be held repealed by Section 136, the *later* statute, since Section 136 specifically covers the *entire* subject matter of Section 139, and is repugnant thereto.

b. Section 139 should be held void and unconstitutional, being contrary to the 5th Amendment of the Constitution of the United States.

1. The legislation concerns a vested right, which is property.

2. Congress has no right to deprive a person of property without due process of law.

3. Congress has no power to govern the descent of property.

4. The classification contained in the section is arbitrary, unreasonable and discriminatory.

5. If the moneys referred to in Section 139 be not considered a chose in action, then the Section can apply only to that part of the month's pension not paid over to the Home Treasurer at the date of the pensioner's death, and such section does not cover the funds in question, and its provisions do not pertain to the same subject matter and is not repugnant to Section 136.

Third: The court overlooked the significance of the contract between the Home and the pensioner.

A. The contract was between a corporation and the pensioner.

B. The contract was valid, being expressly authorized by the granting power (Congress).

C. The contract specifically covered the funds in ques-

tion. (It included *all* personal property of the pensioner, including choses in action.)

D. An attempt by the corporation to circumvent the obligations of the contract by resorting to the provisions of a statute other than the one under which the contract was executed would be an admission of misrepresentation by the corporation.

E. A corporation is estopped from denying the obligations of a valid contract, and is estopped from taking advantage of its own misrepresentations.

F. Assuming that the Veterans' Administration is now the successor to the corporation, and is a branch of the government, it is made, by statute, subject to the obligations of the corporation; and in addition, is also subject to the same rules of estoppel.

Fourth: The Court failed to consider the "probative" force of certain analogous and allied statutes.

A. Section 52, Title 24, provides that the heirs at law or next of kin of a deceased member of the "Soldiers' Home" at Washington, D. C., shall be entitled to his pension moneys *remaining* with the Treasurer of the Home.

1. Walter Searles, the deceased pensioner, might have been a member of said home, had he so desired.

2. As such member the funds in controversy would pass to the respondent.

B. Section 23, Title 24, also provides that the heirs at law or next of kin of a deceased member of the "Naval Home" at Philadelphia, Pennsylvania, shall be entitled to his pension moneys *remaining* with the Treasurer of the Home.

CONCLUSION

The respondent respectfully submits that the funds in controversy constituted pension moneys which had, prior to the death of the pensioner, become due, and that upon such due date the pensioner possessed a vested right in such funds; that Section 138, Title 24, by virture of its express provisions, and by analogy with a kindred section, that of Section 52, Title 24, specifically made such funds, when received by the Home Treasurer, trust funds; that upon such funds being paid to the Home Treasurer the pensioner possessed a vested right to them, such vested right being in the nature of a chose in action; that upon the death of the pensioner, that portion of the funds which had not been disbursed to or for the benefit of the pensioner prior to his death, but still remained in the hands of the treasurer, passed to the heirs at law or next of kin of the pensioner, in accordance with Section 136, Title 24, and the contract entered into between the Home and the pensioner by virtue of such section.

The respondent further submits that Section 138, Title 24 controlled the disposition of such funds until the enactment of Section 136, upon July 25, 1910; that Section 139 was not intended, when passed, (July 1, 1902) to have any application to funds which had already been paid to a home treasurer for disbursement to an inmate of the home, but applied only to such part of a month's pension as had accrued in the hands of the United States Treasurer between the date of the last payment to the home treasurer and the pensioner's death; that upon the enactment of Section 136, such section superseded the provision of Section 138 applying to the disbursement of pension moneys following the death of a member pensioner, and that Section 136 has, since the date of its enactment, controlled the disposition of

all pension moneys *paid* to the home treasurer, for disbursement to the pensioner, prior to the pensioner's death.

The respondent believes that such construction of the several sections is in accordance with the rules of law governing the repeal of statutes by implication, since no statute, excepting a portion of Section 138, is thereby repealed by implication, and such repeal continued for only two years when Congress re-enacted Section 138, omitting the clause so repealed by implication. By virtue of such construction, Section 139 does not apply to pension moneys in which the pensioner or his heirs at law possessed a vested right, and can, therefore, be held constitutional, whereas if Section 139 were to be construed as contended by the Petitioners herein, such section would be unconstitutional as contrary to the due process clause of the fifth amendment to the Constitution of the United States.

The Respondent therefore respectfully submits that the judgment of the court below was in accordance with the law, and that such judgment should be affirmed.

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APPENDIX A.

(1) Section 138, Title 24, U. S. Code. This section as originally passed February 26, 1881 was as follows:

> "All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the Treasurer or Treasurers of said Home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children, or in default of either to his legal representatives." (Sec. 2 of Act of February 26, 1881, c. 80, 21 Stat. 350, 351.)

This section was amended by Act of August 7, 1882, c. 433, 22 Stat. 302, 322, 323, but the provisions thereof were specifically revived in such Act. No further amendments were thereafter made until August 17, 1912, when the Act was amended to read as follows:

> "All pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the Treasurers of said home, to be disbursed for the benefit of the pensioners without deduction for fines or penalties, under the rules and regulations of said home. Said payments shall be made by

the Bureau of Pensions upon a certificate of the proper officer of the Home that the pensioner is an inmate thereof on the day to which said pension is drawn. The Treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension moneys they may receive under the aforesaid provision. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him. (Feb. 26, 1881, c. 80, No. 2, 21 Stat. 350; Aug. 7, 1882, c. 433, No. 1, 22 Stat. 322; Aug. 17, 1912, c. 301, No. 1, 37 Stat. 312.)"

(2) Section 139, Title 24, U. S. Code, passed July 1, 1902:

"Any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the branch of said national home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the home under the direction of the Board of Managers, subject to future reclamation by the relatives designated in this section upon application filed with the Board of Managers within five years after the pensioner's death. (July 1, 1902, c. 1351, Sec. 1, 32 Stat. 564.)"

(3) Section 136, Title 24, U. S. Code, passed June 25, 1910:

"The application of any person for membership in the National Home for Disabled Volunteer

Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant, and as to contain the consent of the applicant to accept membership upon the conditions provided in this section. (June 25, 1910, c. 384, Sec. 1, 36 Stat. 736.)"

APPENDIX B.

Discussion by Congressional Committee upon May 27 and May 28, 1910, concerning Act of June 25, 1910, C. 384, 36 Stat. 736, Sec. 136, Title 24, U. S. C., found in Vol. 45, Part 7, pp. 7011-13, 7101 of the Congressional Records. (61st Congress, 2nd Session.)

MR. TAWNEY:

> "The reason for this provision is this— and I trust I may have the attention of the Committee, because this is a matter of considerable importance. At all of the homes there are a great many soldiers die, leaving on deposit in the banks of the city in which the home is located a certain amount of money. Now, if they die intestate and without heirs that money remains in the bank. Instances have occurred where men have fraudulently taken out letters of administration for the purpose of getting the money on deposit belonging to the soldier at the time of his death. At the Dayton Home in Ohio there is in the banks today over $30,000 unclaimed by relatives or heirs or legatees.
>
> "That fund is increasing, and the committee had information to the effect that the State of Ohio, proceeding under the law of escheat, was about to bring suit against the managers of the banks to recover that money for the benefit of the State. There is in the neighborhood of $30,000 on deposit in the banks of Milwaukee, and there are large sums of money on deposit, unclaimed, in the banks of the cities where all of the other homes are located. Now: Proceeding upon the theory that where the old soldier dies without heirs or legatees, he would rather that money which he leaves behind should be paid into the post fund for the benefit and comfort of his old comrades rather than allow it to go back to the State, of which he might not even be a citizen,

because these men who are in the home are not always citizens of the State in which the home is located; for that reason we have provided here, or we have incorporated this provision, so that in every case where the old soldier dies and leaves money on deposit, or other property undisposed of by will and unclaimed by legatees or heirs, that money shall be used for the benefit of his comrades and not go back to the State under the law of escheat.

"That is the reason for it, and that is all this provision accomplishes; and in order to make it legal this provision provides expressly that the form of application be so changed that every old soldier who applies for admission to one of these homes, in making out his application, is notified of this fact and his consent to the disposition of his money and property at the time of his death is obtained. *In no other way can we change the law of descent in the States.* I do not think there is a member of this House who can justly complain of or criticise the provision. It is in the interest of the old soldiers remaining here after their comrade has died without disposition of his property, that in that event his property, whatever it may consist of, may be deposited for the benefit of those old soldiers who are occupants of these homes."

MR. COX:

"I notice that the paragraph provides that the application shall constitute a binding and valid contract between the applicant and the Board of Managers, not only for the money that the soldier may have as a result of his pension, or the pension he may have remaining at the time of his death, but for all of his personal property. 'Is this proper legislation?' "

MR. TAWNEY:

"***That is not the effect of the provision. Judge Smith drew it, taking into account the fact that most states make provision for the settlement of estates of deceased soldiers. This provision would call to the attention of the applicant that if he *had no heirs*, or if he had not made a will disposing of his property, ***that he would have notice of the fact."

MR. COX:

"Am I right in construing the provision to mean that the application of the applicant seeking admission to the institution and his admission constitutes a binding contract for the disposition not only of the money he may have as the result of his pension, but of all personal property of which he may be the owner?"

MR. TAWNEY:

"As applied to members of the soldiers homes who die in the homes without disposing of their property by will or otherwise, or having no heirs."

MR. COX:

"But is it not made a matter prerequisite under the paragraph that before an individual can be admitted as an inmate, he must enter a contract bargaining away not only his pension, but his personal property?"

MR. TAWNEY:

"He is not bargaining it away at all. He is merely agreeing that in the event of his death while an inmate of the home, and in the event of his not disposing of the property himself, or of his having no heirs, rather than see his property and his money go to the state in which the home is located *****it shall be disposed of for the benefit of his comrades."

MR. COX:

"Does the provision carry all of the personal property that the old soldier may die the owner of while he is an inmate of the institution?"

MR. TAWNEY:

"Certainly. It carries personal property, which includes, of course, any money which he may have on deposit; but it carries it to the home only in the event of his death in the home, without heirs, and without having disposed of his property before death.

MR. KEIFER:

"******I have no trouble about the purpose and propriety of having the estate of deceased members of the National Soldiers Home go to the benefit of their comrades if they die as members intestate and without heirs. But I think it is well for us to look and see whether we can accomplish that purpose by this provision. It is an attempt by federal law to provide a new mode of disposing of an estate without regard to state law. It is an attempt to make, in effect at least, a statute of descent. * * * I think that if the contract is of a proper character it may do this, otherwise I think this provision will merely lead to litigation. The purpose of the bill is to cut off the right of the state to take the property that in legal effect escheats to the state."

(Discussion as to rights of creditors and concensus of opinion that home would only take what was left after all debts of pensioner were paid,—also as to sufficiency of contract and moral question as to whether the State or the institution is more entitled to the funds.)

MR. COX OF INDIANA:

"I do not believe we should offer the old

soldiers the necessity to bargain away the pittance he has. My idea is that he should enter the home free and untrammeled."

MR. KEIFER:

"You say the soldier is required to bargain away his property in advance. I do not understand that there is anything of the kind in the provision. On the contrary, he is only making a contract by which he keeps it from going to the state."

MR. COX:

"A man's property rights are absolute, sacred rights. I do not care if he has $5.00 or $5,000,000 worth of property, it is his."

MR. CULLAP:

"I will ask this question. Is it not fair to assume that under this provision any legatee legally entitled to the estate may come in after the death?"

MR. COX:

"That may be true. ****I am not clear, however, whether or not a soldier can make a will disposing of his estate after he enters the home.****"

MR. KEIFER:

"****I think the criticism that the soldier may be prevented from making a will by the provisions of the bill is not well taken. The bill allows a soldier at any time after he becomes a member of a home to make a will, and if he makes a will that disposes of his property even to a stranger, no matter whether *it disposes of pension money or other property that belongs to him, or if he dies and leaves anybody under the statutes of descent anywhere in the world to inherit it*, then the provision in the bill (that the institution should take the property) could have no application. The question simply is whether or not we can by proper

provision in this bill provide that the soldier shall or can bind himself to allow his estate after his death to go to a post fund of the home in which he is an inmate for the benefit of his surviving comrades in that home.

"I do not believe that we can change the statute of descent of any state, nor do I think we could prevent the estate of any deceased soldier under any contract from being administered upon by the laws of the state in which he was a resident at the time of his death. It would be only by such an appropriate provision as would give the post fund the right to claim it through administration. I was anxious to carry out the purpose of the provision, so that the old veteran soldier might have the consolation, *if he had no blood kin or relative anywhere in the world to inherit his personal estate, and if he did not exercise the right * * * to dispose of his property by will*, of knowing that when he died and left any personal property, however small, it would go to the comfort of other veteran soldiers who were inmates of the home of which he died a member.

(Italics and also matters in parentheses ours.)

SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1936.

The National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration, Petitioners, *vs.* Harvey M. Wood, as Administrator of the Estate of Walter Searles, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 7, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

Decedent was an honorably discharged volunteer soldier of the Civil War. In 1904, he was allowed a pension. October 19, 1924, having made application and signed an agreement in accordance with the Act of June 25, 1910,[1] he was enrolled as a member and admitted to the Danville branch of the National Home for Disabled Volunteer Soldiers and continued to be an inmate until he died, September 16, 1926. During that period the United States paid his pension, in instalments of $72 per month, to the treasurer of the branch. He died intestate, leaving as his sole heir at law, a son over 21 years old. Respondent brought this action to recover $1546.47 of his pension money remaining in the hands of the treasurer after deductions as to which no question has been raised. The district court gave judgment for that amount with interest and costs. 9 F. Supp. 403. The Circuit Court of Appeals affirmed except as to costs.[2] 81 F. (2d) 963. That decision, being in conflict with one of the Circuit Court of Appeals for the First Circuit, *Durack* v. *National Home*, 44 F. (2d) 516, this court granted a writ of certiorari.

Petitioners raise a single question. They maintain that, since the decedent did not leave a widow, minor child or dependent mother

[1] 36 Stat. 736. 24 U. S. C., § 136.

[2] The Circuit Court of Appeals held: Although governmental agencies are named defendants, the suit is in fact one against the United States; § 5, Act of July 3, 1930, 46 Stat. 1017, 38 U. S. C., § 11d, permits allowance of interest against the United States, but costs should not have been allowed.

or father, the accumulated pension fund became payable at his death to the post fund of the Danville branch. If the Act of July 1, 1902,[3] governs, the balance belongs to the post fund. If, as held below, the Act of 1910 and the agreement made in accordance with it control, the administrator is entitled to recover.

Section 2 of the Act of February 26, 1881, provides: "All pensions payable . . . under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurer . . . of said home . . . to be disbursed for the benefit of the pensioners . . . Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or, in default of either, to his legal representatives."[4]

Applicable to the pension money held by the branch were rules and regulations declaring: A pensioner, not classed as incompetent, may direct that all or any portion of his pension money be sent to his wife, minor child or dependent relative; the governor of a branch may prevent hurtful, wasteful or extravagant use of the pension money by retaining a sufficient amount until the danger has passed; pension money standing to the credit of a member sick in hospital will be paid directly to him in such amounts only as are necessary for his personal use; in the case of members classed as incompetent, payment of pension money may be made as follows: (a) to the surgeon in such sums as may be necessary for the personal expenses of the member (b) to a wife, minor child or dependent relative upon the authority of the president of the board of managers (c) to pay taxes, etc., when necessary to protect the interests of the member.[5]

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[3] 32 Stat. 564. 24 U. S. C., § 139.

[4] 21 Stat. 350. Section 2 is contained in an Act making appropriations to pay pensions for the fiscal year ending June 30, 1882. It was applicable only to pensions paid out of the money so appropriated. The Act of August 7, 1882, 22 Stat. 322, provided: "That all pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurers of said home, to be applied by such treasurers as provided by law, under the rules and regulations of said Home. . . . And section two of the act . . . approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force." Cf. 24 U. S. C., § 138.

[5] Par. 253, Regulations of the National Home for Disabled Volunteer Soldiers, 1918, as amended.

The Act of July 1, 1902, provides:

"Hereafter any balance of pension money due a member of the National Home . . . at the time of his death shall be paid to his widow, minor children, or dependent mother or father in the order named, and should" none "be discovered within one year from the time of the death . . . said balance shall be paid to the post fund of the Branch . . . of which the pensioner was a member at the time of his death . . . subject to future reclamation by the relatives hereinbefore designated, upon application filed . . . within five years after the pensioner's death."[6]

Petitioners maintain, and for the purposes of this decision we assume without deciding, that the Act of 1902 relates to pension money paid to the treasurer of a national home for the use and benefit of a member and held by him at the time of the member's death. But it contains nothing that relates to use or disposition of the fund while the pensioner is alive. It relates exclusively to disposition of the balance in the hands of the treasurer at the time of death. In that respect alone, it conflicts with and supersedes the corresponding provisions of the Act of 1881.

The scope and effect of the Act of June 25, 1910, remains to be considered. It provides:

"Hereafter the application of any person for membership in the National Home . . . and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member . . . leaving no heirs nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board . . . for the sole use and benefit of the

[6] Cf. § 4, Act of March 3, 1883, 22 Stat. 564, 24 U. S. C., § 52, prescribing regulations for the Soldiers' Home, Washington, D. C. It provides: ". . . . The pensions of all who . . . are . . . inmates of the Home . . . shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner . . . and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. . . . In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home."

post fund of said home . . . and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board . . . subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member . . ."

Before that enactment, it was disclosed that in the National Home a substantial number of inmates died intestate and without heirs, leaving not only the balance of their pension money remaining in the hands of the branch treasurer but also money on deposit in banks. The Act directs the disposition of personal property left by members dying intestate and without heirs. Congress intended to vest in the board of managers for the post fund only that which, for lack of testamentary disposition and heirs at law, would be liable to escheat to the State. Whether the Act extends to the balance of decedent's pension money accumulated in the hands of the branch treasurer depends upon the meaning to be given to the words "all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived." The words "all personal property" are broad enough to include his beneficial interest in the trust fund created by payments of his pension to the treasurer. The words "including money or choses in action" obviously do not exclude that money. There is nothing to suggest that the phrase "whether such property be the proceeds of pensions or otherwise derived" was intended to eliminate the pension money. It indicates purpose to extend not to restrict. Even if "proceeds of pensions" might be held to refer to something other than pension money, that meaning would have no tendency to exclude funds in the hands of the treasurer. The measure leaves the member free to dispose by will and safeguards to the legatees and heirs the right within five years to reclaim "all the property" that belonged to him at the time of his death. As to that, there is no ambiguity and therefore nothing to construe. To the extent that, in respect of disposition of the pension money in the hands of the treasurer at the time of the member's death, the Act of 1910 is inconsistent with the Act of 1902, the latter is superseded. It follows that respondent is entitled to the fund in question.

Affirmed.